

Decisions of Interest

SEPTEMBER 19, 2022

CRIMINAL

FIRST DEPARTMENT

People v Delisme | Sept. 6, 2022

JUSTIFICATION | REVERSAL

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd degree assault. The First Department reversed and ordered a new trial. The defendant and the complainant lived in a housing complex where each had a separate room providing entry to a shared bathroom to which no one else had access. The court should have granted the defense request for a jury instruction stating that the defendant, who asserted a defense of justification, had no duty to retreat from the bathroom. As a matter of law, the shared bathroom was part of the defendant's dwelling—notwithstanding that he shared it with the complainant. The court delivered an instruction that could have led the jury to erroneously conclude that the bathroom was not part of the defendant's dwelling and that he had a duty to retreat. The error was not harmless. Two justices dissented. The Office of the Appellate Defender (Rosemary Herbert, of counsel) represented the appellant.

[People v Delisme \(2022 NY Slip Op 05130\)](#)

SECOND DEPARTMENT

People v Ramirez | Aug. 31, 2022

COVID-19 | JURY SELECTION

The defendant appealed from a Suffolk County Court judgment, convicting him of aggravated vehicular homicide, 2nd degree manslaughter, and related crimes. The Second Department affirmed. County Court's Covid-19 procedures did not deprive the defendant of meaningful participation in jury selection. Face coverings of potential jurors and social distancing did not interfere with the defendant's ability to observe the jurors and to assess their demeanor. He was not entitled to a mistrial on the ground that the decedent's widow cried at the outset of the People's opening remarks where her emotional display was inconspicuous.

[People v Ramirez \(2022 NY Slip Op 05098\)](#)

People v Abad | Aug. 31, 2022

SEARCH WARRANT | PRESERVATION

The defendant appealed from a judgment of Richmond County Supreme Court, convicting him of aggravated vehicular homicide, 2nd degree manslaughter, and related crimes, upon a jury verdict. The Second Department affirmed. The appeal brought up for review the denial of a defense motion to controvert a search warrant and suppress results of a blood alcohol test. The contention that the warrant was not supported by probable cause was preserved for appellate review. Although the defendant did not raise such argument in his motion, Supreme Court expressly decided the issue. See CPL 470.15 (2). But that argument had no merit. A concurring judge deemed unpreserved the defendant's assertions upon appeal that the warrant affidavit did not satisfy the *Aguilar-Spinelli* test. The defendant's motion advanced no arguments along those lines; Supreme Court made no specific findings as to the reliability of the information in the affidavit; and caselaw cited in the decision did not indicate that the court had resolved *Aguilar-Spinelli*-related issues. [People v Abad \(2022 NY Slip Op 05094\)](#)

People v Whyte | Sept. 14, 2022

TESTIMONY | NOT INCREDIBLE

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd and 3rd degree CPW, upon a jury verdict. The Second Department affirmed. The appeal brought up for review the denial of suppression. The defendant's father and grandmother testified that they did not consent to a search of the apartment. The credibility determinations of a hearing court were accorded great deference on appeal and would not be disturbed unless clearly unsupported by the record. As to the officer's version of events, testimony that was incredible and unbelievable was to be disregarded as lacking evidentiary value. But the officer's testimony was not manifestly untrue, physically impossible, contrary to experience, self-contradictory, nor patently tailored to nullify constitutional objections. Complaints received by the CCRB as to the officer failed to discredit his testimony insofar as the allegations were unsubstantiated or did not bear on credibility.

[People v Whyte \(2022 NY Slip Op 05171\)](#)

People v Walker | Sept. 14, 2022

SORA | STANDARD

The defendant appealed from orders of Queens County Supreme Court designating him a level-three sex offender. The Second Department affirmed. Supreme Court erroneously applied a preponderance-of-the-evidence standard to the People's application for an upward departure. But the record was sufficient for the appellate court to make its own findings under the correct standard—clear and convincing evidence that certain aggravating factors were not fully accounted for by the Guidelines. The presumptive risk levels underassessed the defendant's actual danger to the community.

[People v Walker \(2022 NY Slip Op 05172\)](#)

THIRD DEPARTMENT

People v Werkheiser | Sept. 15, 2022

440 MOTION | RECANTATION | HEARING

The defendant appealed from an order of Tioga County Court, which summarily denied her CPL 440.10 motion to vacate a judgment convicting her of predatory sexual assault of a child (two counts). The Third Department reversed and remanded for a hearing. The victims, two sisters, alleged that they were sexually abused by their mother and the defendant, who was married to the mother and ran a dance studio with her. In support of her motion, the defendant submitted as newly discovered evidence affidavits from six witnesses who said that victim B had recanted. Victim A, the older sister, was alleged to have coached victim B regarding what to say in court. In further claiming actual innocence, the defendant produced the report of a child psychologist, who analyzed the recantation and opined that victim B was coerced into fabricating her allegations and who noted victim B's low IQ and cognitive deficits—problems her sister also had. While the reliability of a recantation is often viewed with skepticism, such evidence may form the basis for overturning a conviction when the defendant produces substantial evidence that the prior testimony was false. A hearing was also warranted as to ineffective assistance, given that trial counsel failed to call an expert to refute the People's claims about child sex abuse accommodation syndrome and to explore the victims' susceptibility to false memories. Arthur Larkin represented the appellant.

[People v Werkheiser \(2022 NY Slip Op 05188\)](#)

People v Peasley | Sept. 15, 2022

440 MOTION | RECONTATION | NO HEARING

The defendant appealed from a Clinton County Court order denying, without a hearing, his CPL 440.10 motion to vacate a judgment convicting him of 2nd degree strangulation based on newly discovered evidence—the victim's recantation of her testimony. The Third Department affirmed. Recantation evidence was inherently unreliable. The victim's suggestion that her prior testimony was attributable to her failure to appreciate the implication of her words was unbelievable. The new explanation she provided about her neck injuries was contradicted by her trial testimony, in which she unequivocally described the injuries.

[People v Peasley \(2022 NY Slip Op 05186\)](#)

People v Mirabal | Sept. 15, 2022

ANDERS | NEW COUNSEL

The defendant appealed from a judgment of Delaware County Court, convicting him of 3rd degree CSCS. Appellate counsel submitted an *Anders* brief. The Third Department assigned new counsel. There was in issue of arguable merit with respect to the validity of the defendant's appeal waiver that might potentially impact other issues, such as the severity of the sentence, the defendant's predicate sentencing status, and whether he was accurately advised of his potential sentencing exposure. Thus, the appeal was not wholly frivolous.

[People v Mirabal \(2022 NY Slip Op 05185\)](#)

FAMILY

THIRD DEPARTMENT

John II v. Kristen JJ. | Sept. 8, 2022

CUSTODY | REVERSED

The father appealed from an order of Clinton County Family Court, which granted the mother's motion to dismiss his petition at the close of his proof. The Second Department reversed. Family Court erred in denying the father's motion to have the Family Court judge disqualified from the matter, based on his representation of the mother in prior proceedings to resolve the custodial arrangement of the parents as to their three children. The judge was statutorily disqualified from the instant proceedings. The matter was remitted before a different judge for a new fact-finding hearing. Todd Monahan represented the appellant.

[John II. v Kristen JJ. \(2022 NY Slip Op 05132\)](#)

Leslie LL. v Robert NN. | Sept. 8, 2022

GRANDPARENTS | NO EXTRAORDINARY CIRCUMSTANCES

The petitioners appealed from an order of Schenectady County Family Court, which dismissed their petitions seeking custody of a stepson. The Third Department affirmed. The petitioners offered testimony about their close bond with the boy. But extraordinary circumstances may not be established merely by showing that a child has bonded psychologically with the nonparent.

[Leslie LL. v Robert NN. \(2022 NY Slip Op 05189\)](#)



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